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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-25

HAMMONS PRODUCTS COMPANY,
Petitioner,

vs.

AGRASHELL, INC.,
Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION OF HAMMONS PRODUCTS COMPANY FOR A WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE CASE

Petitioner Hammons has sought review of that part of a decision by the Court of Appeals for the Eighth Circuit which reversed a treble damage judgment for $487,122 entered on a jury's award for patent litigation expenses alleged to have been caused in violation of Section 2 of the Sherman Act.

The "Statement" in Hammons' petition (presumably, a statement of the case and of the facts): (1) admits total failure of proof of a relevant market and market shares (Petition, p. 3); (2) asserts as fact an allegation of bad intent (Petition, p. 4) which the Court of Appeals did not

find substantiated; and (3) urges this Court to rule that the single element of an alleged "intent", where not accompanied by any related market power or even a threat of attaining it, is enough to constitute an illegal attempt to monopolize under Section 2 of the Sherman Act (Petition, pp. 5-6).

Proceedings Below

This action arose in 1965 on Agrashell's complaint seeking damages for past infringement of its expired Perry reissue patent No. RE. 23,422. Hammons in response pleaded fraudulent procurement of the patent and misuse of it to harass competitors, and counterclaimed on these and related grounds for violation of various anti-trust laws. On a trial to the District Judge in 1967, the patent was held invalid, and not infringed because invalid; no misuse was found, and a claim for attorneys' fees based on the alleged misuse was denied.

The 1967 judgment was affirmed in whole on appeals of both parties. Thereafter, Hammons was permitted to take the counterclaim to a jury trial on the same, previously tried charges of fraudulent procurement and misuse of the patent. At the close of that trial in 1970, the District Judge withdrew the fraud issue from the jury for lack of evidence but, nonetheless, submitted as a Section 2 case the claim for patent litigation expense (App. 974T, 981-84T, 996T). The ensuing verdict in this regard was trebled to form the part of the judgment reversed by the Court of Appeals.

The Parties and Competition Involved

Agrashell is a small Los Angeles company which in the 1930's pioneered the development of commercial products from waste nut shells. Hammons is a sheller of black walnuts, having a plant at Stockton, Missouri. The parties are nearly identical in size.

In 1945 Agrashell entered into the production of hard nutshell blast cleaning abrasives from apricot pit shells and black walnut shells, for military use according to the Perry invention. This material, its "Shelblast" product, became one of a number of blast cleaning materials referred to as "soft grit abrasive" (SGA) (App. 762T, 779-80T, 784-85T). In 1947, upon learning that the Perry patent was about to be issued, Agrashell obtained an exclusive license under it (App. 777-78T, 800-802T); later, Agrashell became the full owner (App. 835-38T).

In order to develop an industrial market for the material, Agrashell shipped its product in carloads to warehouses located near the prospective consumers, in distant Eastern and Midwest industrial areas, and kept stocks there at its own risk and expense (App. 781-85T). It made deliveries from these stocks on orders procured by sales agents who, for commissions on the sales, procured customers and gave them service (App. 780-83T, 786T). Agrashell in this way was able to supply customers who bought in small quantities on orders which could be delivered promptly from the regional warehouses in a variety of product sizes.

In 1957-1958 Hammons entered the market for the Perry patent material, by producing the material from black walnut shells and shipping directly from its plant in Missouri either to customers or to jobbers for resale (App. 65-68T). Hammons did not maintain regional warehouse facilities in order to service small orders, and did not actively solicit them. Hammons soon had captured, and retains, 100% of the large Detroit area automotive market for the material (App. 39-40T, 292-94T, 698-700T, 797-800T). In Columbus, Ohio, alleged by Hammons to be a "model market", it had 60% and Agrashell had 40% of the parties' sales (405T). No other comparative sales figures are in evidence.

During the alleged damage period, *at least ten companies other than Agrashell and Hammons* manufactured SGA, and various *additional companies distributed the material* (Opinion, p. 7). Hammons' business prospered and grew during that period (Opinion, p. 20).

What Hammons refers to as Agrashell's "concerted campaign to gain control of the entire market by assertion of its alleged patent rights" (Petition, p. 4) consisted principally of customary infringement notices followed by infringement suits on advice of patent counsel against Pangborn in 1962 and Sirotta, Hammons, and Block on various dates in 1963. Pangborn settled early in 1962 when its counsel, upon investigation, concluded the patent was valid, by Pangborn's acknowledgment thereof and request to supply Agrashell's Shelblast which resulted in the Pangborn contract (App. 737-42T).

The Sirotta suit was filed after license and settlement negotiations broke down, although Sirotta's patent counsel had concluded there was insufficient basis to challenge the patent at least so far as prior art was concerned (App. 148-49T, 803-805T).

Before the Hammons suit was filed, Agrashell offered to settle upon payment of royalties on sales of the material described in the patent (the amount sold to be determined by Hammons) and Hammons to accept a license (App. 69-72T, 248T, 252-69T). Negotiations broke down partly because Hammons did not consider apricot pit to come within the patent, but primarily because Hammons finally decided it would not pay the royalty after first evidencing an intent to settle on that basis (App. 69-72T, 248T, 252-69T).

The Block suit was finally settled for $2500 (App. 852T).

REASONS FOR DENYING THE WRIT

A. The Petition Is Basically Defective in Its Factual Premises

First, Hammons' petition implies misleadingly (p. 3) that there was definitive proof of the market positions of the parties, calling them "the principal competitors". The Court of Appeals said as to this:

> Not only did Hammons fail to show the total sales or volume of SGA; it also failed to show what shares of that market were held by Agrashell, Hammons and several other major competitors (Opinion, p. 31).

Then the petition *admits* as to all the other competitors in the market (the Court of Appeals' opinion named *more than ten others*) that:

> While there were *several* other competitors in the market, there is insufficient evidence in the record to show what the total market was and the respective shares of these additional competitors (Petition, p. 3).

As to proof of the geographic market subject to the alleged attempt to monopolize, the Court of Appeals said:

> . . . it is difficult, if not impossible, to know exactly what geographic market Hammons claims Agrashell attempted to monopolize. *The two principal sub-markets* identified by Hammons *were Detroit, Michigan, and Columbus, Ohio. In Detroit, Hammons apparently had the entire market,* and *in Columbus, it had a larger share than Agrashell* (Opinion, p. 30).

The opinion below points out further: "Indeed, the evidence showed that both Agrashell and Hammons prospered during the period in question and made overall gains in the sale of their nutshell products." (Opinion, p. 20); also, at page 31, n. 9: *"Hammons sales nearly doubled, and Hammons acquired the controlling interest in Gravette"* [a major regional competitor].

One justifiably wonders what Hammons has been complaining about, and seeking to achieve by its persistence in this litigation. It has *twice* taken to trial claims for the recovery of attorneys' fees based on charges of fraudulent patent procurement, by which it attempted at both trials to assimilate this case to the patent fraud doctrine announced by this Court in the 1965 decision of *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965). Although those charges finally were buried by the trial judge at the end of the 1970 trial, their goal was attained nonetheless until the Court of Appeals reversed the judgment in this regard. Until then, the judgment was for a sum greater than the net worth of Agrashell.

Second, Hammons continues on in its "Statement" (p. 4) to assert, heedless of the opinion below, its *allegation* that Agrashell "instituted a concerted campaign to gain control of the entire market by assertion of its alleged patent rights." The Court of Appeals, however, described the proof on this as follows:

> At the outset, we emphasize that the trial court did not submit the issue of fraudulent procurement of the patent to the jury and no cross-appeal was taken on that issue. *Thus, the declaration of patent invalidity did not prohibit Agrashell from relying on the presumptive validity of the patent.* It therefore

had every right to bring each of the three lawsuits against Sirotta, Hammons, and Block if its purpose in each case was merely to enforce its rights under the patent. The obvious and difficult problem in this case relates to differentiating between Agrashell's intent to bring suits and enter into contracts under a presumptively valid patent, thereby enforcing and utilizing a lawful monopoly, and its alleged intent to bring suits and enter into contracts under a presumptively valid patent for the purpose of extending the scope of the patent beyond the grant allowed by law. *The proof of that alleged illegal intent is thin indeed.*

The evidence in this case indicates quite clearly that *Hammons sold a product that, but for the declaration of invalidity, would have infringed Agrashell's patent;* that Sirotta sold the Hammons product, which, as the trial judge indicated, was an "admittedly infringing" one; that Gravette and Block also sold an SGA product which was composed of black walnut shell and that Pangborn at one time merchandised Gravette's product; and that Sirotta's patent counsel and Pangborn's patent counsel could not find sufficient grounds for challenging the patent on the grounds the patent was subsequently declared invalid (Opinion, pp. 27-28).

The Court of Appeals, additionally, criticized on a number of grounds the Hammons' proof of alleged illegal intent which it had found "thin indeed" (Opinion, p. 27).

B. The Alleged Conflict with Lessig v. Tidewater Oil Is Ephemeral

Much is made in the petition of an alleged conflict of the Court of Appeals' ruling with a statement—the only

one of its kind—which was made in *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459 at 474 (9th Cir. 1964). The *Lessig* opinion, however, does not actually stand for the sweeping doctrine which the petitioner says it declared. This is evident from the whole of the opinion and also from more recent cases in which the same (Ninth) Circuit has held that, for an attempt to monopolize under Section 2 of the Sherman Act, there must be *proof* of ". . . *sufficient market power* to come *dangerously close* to success . . .", *Cornwell Quality Tools Co.* v. *C.T.S. Company*, 446 F.2d 825, 832 (9th Cir. 1971); or, proof of "the necessary market power to produce the unlawful result", *Moore* v. *Jas. H. Matthews & Co.*, 473 F.2d 328, 332 (9th Cir. 1972).

The factual situation and the actual basis for the ruling in *Lessig* bear no resemblance to this case. The basis of the *Lessig* ruling is not just the statement Hammons relies upon. The Ninth Circuit made this clear by its *per curiam* opinion on Tidewater's petition for rehearing, 327 F.2d at 478, where the Court pointed out that the part of the opinion urged here by Hammons "*is to be read with the remainder*" which emphasized the *special anti-competitive facts* of the *Lessig* case:

> The earnestness with which Tidewater suggests that Part III of the opinion may be read as rendering illegal any competitive effort to gain a share of available business leads us to add what might seem to be obvious: *that Part III of the opinion is to be read with the remainder*, and in light of the anti-competitive purposes and conduct to which the case relates. 327 F.2d at 478.

What that *remainder* of the *Lessig* opinion discloses is (1) a conspiracy or combination involving coercion of dealers to fix the resale price of gasoline (327 F.2d at 463),

(2) ". . . disproportionate size and economic strength of the parties . . ." (327 F.2d at 467), (3) exclusive dealing and tying arrangements (effected by leasing and dealer contracts imposed against the dealers' wishes) with 2,700 service station operators in eight western states (327 F.2d at 467) and (4) proof of the percentage of total gasoline sales made in the area through Tidewater stations (327 F.2d at 468).

Most importantly, the whole of the *Lessig* opinion, including that "remainder" of it referred to in the *per curiam* ruling, discloses the presence in the *Lessig* case of both a combination or conspiracy covering an eight-state market area and "dangerous probability of success" in fixing the resale prices, and excluding competitors from the patronage of 2,700 independent service station operators who collectively were considered to constitute a market, i.e., "a part of interstate commerce" (327 F.2d at 475).

The Court of Appeals rightly did not consider *Lessig* applicable in the present case, where *all* such conduct is *totally* absent.

C. This Court's Ruling in the Walker Process Case Is Additionally Dispositive of the Petition

Walker Process Equipment, Inc. v. *Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965), additionally negates petitioner's argument of conflict and its argument of alleged need to clarify decisions of this Court.

In *Walker Process*, this Court said:

> To establish monopolization or attempt to monopolize a part of trade or commerce under § 2 of the Sherman Act, it would then be necessary to appraise

> the exclusionary power of the illegal patent claim *in terms of the relevant market for the product involved. Without a definition of that market there is no way to measure Food Machinery's ability to lessen or destroy competition.* 382 U.S. at 177. [Emphasis added]

Those are not mere "general statements" as petitioner says (p. 11), but constituted a *ruling* by this Court which defined the elements of the offenses of monopolizing and attempting to do so, and directed the trial court on remand what it must determine in order to find *either* offense proved. That ruling came after, and it eliminated any supposable basis for reliance upon, the strange statement in *Lessig* (which the Ninth Circuit itself had qualified by the *per curiam* ruling) that "when the charge is an attempt (or conspiracy) to monopolize, rather than monopolization, the relevant market is 'not in issue'" (327 F.2d at 474).*

The petitioner here, in 1966, injected into an extraordinarily simple patent infringement suit, which sought nothing beyond damages for past infringement of an expired patent, an anti-trust counterclaim under which petitioner has tried and failed twice to make out a fraud case under the *Walker Process* doctrine announced a year earlier. This Court in *Walker Process* held that a Section 2 violation would exist if a fraudulently procured patent were shown to have been used in an attempt to monopolize, but ruled also that proof of fraudulent procurement would

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*The *Lessig* opinion cites in support of that statement a footnote in *United States* v. *E. I. DuPont & Co.*, 351 U.S. 377, 395 n. 23 (1956), but the cited footnote does not support the statement. It refers to cases of various types which involved *conspiracies*, saying that *in one case* [a conspiracy case] the relevant market was not in issue. It refers to attempt cases only to show that "monopolies may well exist over limited products in narrow fields where competition is eliminated." Nothing in *DuPont* suggests that whether competition has been or will be eliminated in a narrow market can be determined without proof.

not, without more, be enough to constitute a violation—additionally, it would then be necessary to appraise the exclusionary power of the illegal patent claim in terms of the ability it gave the patentee to lessen or destroy competition in the relevant market for the product involved.

Hammons tried and failed to prove the primary fraud requisite of *Walker Process*, and did so without even attempting to prove that the patent, which then was totally impotent in the market, or the suits for infringement damages, could give Agrashell any market power. Having obtained a jury verdict nonetheless, Hammons by its petition is simply flying in the face of the second requisite clearly expressed in *Walker Process* and, as well, of the fundamental requisite of proof of any illegal attempt to commit an unlawful act.

D. The Petition Ignores the Fundamental Distinction Between Mere Intent and an Attempt

The petition is fundamentally in error, and contradictory to a long settled principle of the law, in its argument to the effect that proof of a subjective, anti-competitive intent, however isolated or impotent, is enough to establish an attempt to monopolize under Section 2 of the Sherman Act. The argument ignores the distinction between a mere purpose to outdo competitors, which exists in all competition, and an attempt to monopolize, which requires both a specific intent and sufficient power in the relevant market to make it probable that monopolization could be achieved.

This distinction was first enunciated by this Court in *Swift & Co.* v. *United States*, 196 U.S. 375 (1905), where the opinion points out:

> Not every act that may be done with intent to produce an unlawful result is unlawful, or constitutes an attempt. It is a question of proximity and degree. The distinction between mere preparation and attempt is well known in the criminal law. *Commonwealth* v. *Peaslee*, 177 Massachusetts 267, 272 [59 N.E. 55, per Holmes, J.]. The same distinction is recognized in cases like the present. [196 U.S. at 402]

The opinion of this Court in *American Tobacco Co.* v. *United States*, 328 U.S. 781, 785 (1946), spelled out the elements of an illegal "attempt to monopolize", making it perfectly clear that the offense is not one of mere intent but involves "the employment of methods, means or practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it. . . ."

American Tobacco expresses the law as it has always existed, and as it has been applied by the Courts, whenever a case turned on the "attempt to monopolize" clause.

In *United States* v. *Winslow*, 227 U.S. 202, 218 (1913), which was such a case, this Court said:

> Until the one intent is nearer accomplishment than it is . . . no intent could raise the conduct to the dignity of an attempt. See Virtue v. Creamery Package Manufacturing Co. [227 U.S. 8 (1913)]. Swift & Co. v. United States, 196 U.S. 375, 396.

So it is in this case, as the Court of Appeals rightly held in reversing the judgment for patent litigation expense.

THE IMPORTANT REMAINDER OF THIS CASE

During five weeks of elaborate presentations to a jury, Hammons failed in all respects to prove either the market that Agrashell allegedly attempted to monopolize or wherein Agrashell's acts in assertion of its patent held any capability or threat of monopolizing anything.

Even on the issue of intent, the Court of Appeals was hesitant to give credence to Hammons' evidence, considering it ". . . thin indeed . . ."; we ". . . hesitate to attach much significance . . ."; "We question this evidence . . ."; ". . . we attach little significance . . ."

The Court of Appeals saw this case as one of near-complete failure of proof of *anything* competent to support the trial court's judgment; which brings Agrashell to one final matter.

By the same decision to which the petition of Hammons is directed, the Court of Appeals affirmed a part of the judgment below which awarded Hammons $125,250.00 for "loss of profits". It did so by (1) holding that the jury could have considered in violation of Section 1 of the Sherman Act each of two sales agency contracts for the distribution of Agrashell's product, the principal one of which is a simple agency agreement, terminable annually at will, for *original* sales of the product at Agrashell's announced price, and (2) letting stand as proof of the alleged fact of damage to Hammons' business a *mere theory* of a professional witness, even though the Court found the theory to be *"highly questionable"* for having *"many practical defects"* constituting *"serious failings"* and to be based on *"conclusively negated" assumptions of illegality* in Agrashell's conduct.

Those rulings profoundly vitiate the *fact of damage* requisite of anti-trust treble damage claims, and, additionally, they have the far-reaching, unprecedented effect of outlawing simple sales agency agreements (where made by a patentee, if not otherwise) that have always been lawful both at common law and under the decisions of this Court. They, therefore, are the subject of a limited, currently pending petition (No. 73-140) of respondent Agrashell for a writ of certiorari to the Court of Appeals for the Eighth Circuit.

The questions presented by that petition constitute an important remainder of this case which gravely needs the consideration of this Court.

CONCLUSION

The petition of Hammons Products Company should be denied.

Respectfully submitted,

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